UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GIL ESPINOBARROS APOLINAR and DELFINO FELIX VARGAS, *individually and on behalf of others similarly situated,*

Plaintiffs,

-against-

R.J. 49 REST., LLC d/b/a Toasties (at 148 W 49th Street), ARK 48th CORP d/b/a Toasties (at 6 E 48th Street), JOHN DOE 01 CORPORATION d/b/a Toasties (at 23 E 51st Street), N.J. 52 INC. d/b/a Toasties (at 599 Lexington Ave), 924 THIRD AVE. DELI, INC. d/b/a Toasties (at 924 Third Ave), JOHN DOE 02 CORPORATION d/b/a Toasties (at 924 Third Ave), TOASTIES ONE CORP d/b/a Toasties (at 214 7th Ave), TOASTIES DELI CORP d/b/a Toasties (at 214 7th Ave), CCKO, INC. d/b/a Toasties (at 25 Union Sq. West), ROBERT KIM, ELLIOT LEE, SUSAN KIM and RAYMOND KIM,

Defendants.

No.: 15-cv-8655 (KBF)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' R.J. 51 INC.'S, N.J. 52 INC.'S AND SUSAN KIM'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT PURSUANT TO RULE 12(B)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE

JACKSON LEWIS P.C.
ATTORNEYS FOR DEFENDANTS
666 Third Avenue
New York, New York 10017
(212) 545-4000

Attorney of Record:
Richard I. Greenberg, Esq.

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Defendants R.J. 51 Inc., N.J. 52 Inc. (the "Corporate Defendants") and Susan Kim (the "Individual Defendant") (collectively, "Moving Defendants") submit this Memorandum of Law in Support of their Motion to Dismiss Plaintiffs' Amended Complaint ("Complaint") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[1]

PRELIMINARY STATEMENT

The Moving Defendants move to dismiss the Complaint because Plaintiffs fail to state a claim against them under either the Fair Labor Standards Act ("FLSA") or New York Labor Law. The Moving Defendants have been sued by, but never did employ, Plaintiffs. The Complaint alleges that Plaintiffs work (or worked in the case of Plaintiff Apolinar) at R.J. 49 Rest., LLC d/b/a Toasties (at 148 W 49th Street).[2] Beyond these allegations, the Complaint sets forth nothing more than boilerplate resuscitations of the applicable legal standard and conclusory allegations regarding the alleged involvement of the Moving Defendants in an attempt to inappropriately expand the scope of this action. The Complaint does not plead facts sufficient to render plausible that the Moving Defendants exercised any formal or functional control over Plaintiffs. Such factually barren allegations do not satisfy the *Iqbal/Twombly* pleading standard. Therefore, Plaintiffs' FLSA and NYLL claims against the Moving Defendants merit dismissal.

SUMMARY OF ALLEGATIONS

Plaintiffs Gil Espinobarros Apolinar and Delfino Felix Vargas ("Plaintiffs") bring this putative class and collective action against the Moving Defendants, as well as several other companies and individuals they allege did business under the name "Toasties."[3] Compl. ¶¶ 26, 33-43. During the relevant period, Plaintiffs were employed as deliverymen by Defendant R.J. 49 Rest., LLC d/b/a Toasties located at 148 West 49th Street, New York, New York 10019 ("Employer").[4] Compl. ¶¶ 13-14. Plaintiffs do not claim that they worked at any other Toasties location. Rather, Plaintiffs allege in boilerplate fashion that the Moving Defendants, as well as the other named corporate and individual defendants, were their employer under the FLSA and NYLL and violated these statutes by allegedly: (i) failing to comply with meal credit provisions of the FLSA and NYLL; (ii) impermissibly retaining tips in violation of the FLSA and NYLL; (iii) impermissibly deducting from gratuities earned by Plaintiffs in violation of the NYLL; (iv) failing to pay Plaintiffs the statutory minimum wage under the FLSA and NYLL; (v) failing to pay Plaintiffs overtime under the FLSA and NYLL; (vi) failing to provide Plaintiffs with required notices under NYLL Section 195; and (vii) retaliating against Plaintiffs in violation of the FLSA and NYLL (on behalf of Plaintiff Apolinar only). *Id.* ¶¶ 165-261.[5] As noted above, Plaintiffs' allegations regarding the Moving Defendants' involvement in their employment are devoid of any factual content regarding the relationship between the Moving Defendants and Plaintiffs – as no such relationship exists.

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[1] A copy of Plaintiffs' Amended Complaint dated March 28, 2016 is attached as Exhibit A to the Declaration of Richard I. Greenberg, Esq. in Support of the Moving Defendants' Motion to Dismiss Plaintiffs' Amended Complaint.

[2] Defendant R.J. 49 Rest., LLC and Robert Kim filed an Answer to Plaintiffs' Complaint and do not join in this motion.

LEGAL STANDARD

In reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court must "construe the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *See Williams v. City of New York*, 03 Civ. 5342 (RWS), 2005 U.S. Dist. LEXIS 26143, at *5 (S.D.N.Y. Nov. 1, 2005) (internal citations omitted). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). As a result, legal conclusions "must be supported by factual allegations." *Id.* at 679. Accordingly, to survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Id.* at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

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[3] The undersigned counsel represents only the Moving Defendants and Defendants R.J. 49 Rest., LLC and Robert Kim.

[4] Plaintiff Vargas remains employed by Defendant R.J. 49 Rest., LLC.

[5] Plaintiffs also claim that the all named defendants breached an implied contract with Plaintiffs, in violation of the common law, and violated 26 U.S.C. § 7434 and New York General Business Law § 349 for "filing a fraudulent information return." Plaintiffs' Amended Complaint is completely silent as to what "fraudulent information return" Defendants purportedly filed.

"Under Federal Rule of Civil Procedure 8(a)(2), a 'plausible' claim contains 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Lundy v. Catholic Health Sys. of Long Island, Inc.*, 711 F.3d 106, 114 (2d Cir. 2013) (quoting *Iqbal*, 556 U.S. at 678). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Rather, the factual allegations must "possess enough heft to show that the pleader is entitled to relief." *Id.* at 557. Thus, unless a plaintiff's well-pleaded allegations have "nudged [his] claims across the line from conceivable to plausible, [the plaintiff's] complaint must be dismissed." *Id.* at 570; *see Iqbal*, 556 U.S. at 680. As this Court has observed, "a court is 'not bound to accept as true a legal conclusion couched as a factual allegation.'" *Baez v. New York*, 56 F. Supp. 3d 456, 466 (S.D.N.Y. 2014) (quoting *Twombly*, 550 U.S. at 544) (dismissing discrimination claims for failure to plead facts sufficient to raise an inference that the reason Plaintiff was not promoted was her national origin).

ARGUMENT

I. PLAINTIFFS' COMPLAINT FAILS TO ALLEGE FACTS SUFFICIENT TO STATE A CLAIM AGAINST THE MOVING DEFENDANTS UNDER THE FLSA OR NYLL[6]

A. Plaintiffs' Complaint Fails to Allege Facts Sufficient to State a Claim Against the Corporate Defendants Other Than Employer

(i) Employer Standard under the FLSA

To be held liable under the FLSA, a person or entity must be deemed an "employer." 29 U.S.C. § 203(d). An entity or individual "employs" an individual if it "suffer[s] or permit[s]" that individual to work. 29 U.S.C. § 203(g). Pursuant to the FLSA, "the overarching concern is whether the alleged employer possessed the power to control the workers in question . . . with an eye to the 'economic reality' presented by the facts of each case." *Herman v. RSR Sec. Servs.*, 172 F.3d 132, 139 (2d Cir. 1999); *see also Lopez v. Acme Am. Envtl. Co.*, No. 12 Civ. 511 (WHP), 2012 U.S. Dist. LEXIS 173290 at *3 (S.D.N.Y. Dec. 6, 2012). The economic reality test generally considers four relevant factors: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled the employee work schedules or schedules of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Herman*, 172 F.3d at 139 (quoting *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984)); *see also Lian Lin*, 2009 U.S. Dist. LEXIS 29779, at *7 (failure to allege "allege any facts regarding the positions held by the Individual Defendants or their power to control plaintiffs' hours, wages, or other terms and conditions of employment" required dismissal of FLSA claims against such individual defendants). These factors help to determine whether an entity exercised formal control over an employee.

[6] The entirety of this section applies equally to Plaintiffs' claims under the FLSA and NYLL. *See Xue Lian Lin v. Comprehensive Health Mgmt.*, 08 CV 6519 (PKC), 2009 U.S. Dist. LEXIS 29779, at *5-6 (S.D.N.Y. Apr. 8, 2009) (finding the analysis of whether a defendant constitutes an employer is the "same" under both the FLSA and NYLL).

The economic reality test is useful because "when an entity exercises those four prerogatives, that entity, in addition to any primary employer, must be considered a joint employer." *Zheng v. Liberty Apparel Co.,* 355 F.3d 61, 67 (2d Cir. 2003). Alternatively, an entity may functionally control workers even when it does not formally control them. *See Zheng,* 355 F.3d at 67 (2d Cir. 2003). The Second Circuit analyzes functional control through a six-part test: "(1) whether [Defendants'] premises and equipment were used for the plaintiffs' work; (2) whether [Defendants] had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which plaintiffs performed a discrete line-job that was integral to [Defendants'] process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the [] Defendants or their agents supervised plaintiffs' work; and (6) whether plaintiffs worked exclusively or predominantly for the [] Defendants." *Id.*[7] The formal and functional tests for employment are non-exhaustive and not "rigid rule[s]." *Barfield v. N.Y.C. Health and Hosps. Corp.,* 537 F.3d 132, 143 (2d Cir. 2008).

Importantly, courts in this District have repeatedly recognized that "companies that are part of an 'integrated enterprise' or 'engaged in a joint venture' may nevertheless employ separate people and, *absent control*, are not liable for the separate employees of joint ventures." *Lopez*, 2012 U.S. Dist. LEXIS 173290, at *4 (emphasis added) (citing *Cannon v. Douglas Elliman, LLC,* No. 06 Civ 7092 (NRB), 2007 U.S. Dist. LEXIS 91139, at *10-11 (S.D.N.Y. Dec. 10, 2007)); *see, e.g.*, *Wolman v. Catholic Health*, 853 F. Supp. 2d 290, 298 (E.D.N.Y. 2012) (holding that allegations "which perhaps establish[] some general commonalities between

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[7] The Moving Defendants note that the functional *Zheng* test was developed to address the scenario – common in the pieceworker industry and dating back decades – where a dominant client functionally controlled the operations of a subcontractor. Such a scenario is not present here; Plaintiffs were employed by Employer to work at the Toasties owned and operated by Employer.

Defendants" do not establish control such that joint employment is adequately plead); *Sampson v. MediSys Health Network, Inc.*, No. 10 Civ. 1342, 2012 U.S. Dist. LEXIS 103052, at *12 (E.D.N.Y. July 24, 2012) (holding that although plaintiffs' allegations "may suggest some kind of affiliation among the defendants," they were insufficient to allege a joint employer relationship); *Diaz v. Consortium for Worker Educ., Inc.*, No. 10 Civ. 08148 (LAP), 2010 U.S. Dist. LEXIS 107722, at *10 (S.D.N.Y. 2010) (holding that allegation which "only shows that defendants shared a common goal" is insufficient to qualify defendants as joint employers).

(ii) Plaintiffs Do Not Allege Facts To Support A Finding That The Corporate Defendants Are Plaintiffs' Employer

For example, in *Lopez*, plaintiffs sought unpaid overtime wages from several corporate defendants pursuant to the FLSA and NYLL. Plaintiffs alleged that all of the corporate defendants (1) were under common control, (2) operated from a single facility and shared key employees, including a bookkeeper, an accountant, and a general manager, and (3) shared a common clientele and worked for the common purpose of providing a full range of services to companies with commercial kitchens. 2012 U.S. Dist. LEXIS 173290, at *10. In granting a motion to dismiss the corporate entities, the Court found that "[a]lthough they allege an 'integrated enterprise,' Plaintiffs cannot escape their obligation under the FLSA to allege a relationship of control between the Corporate Moving Defendants *and themselves*." *Id.* at *11 (emphasis added). Because the plaintiffs did not allege any particularized facts which demonstrated that the "economic reality" of the relationship between the plaintiffs and the corporate defendants was one of control, the Court held that plaintiffs did not state an FLSA claim against the corporate defendants and dismissed the complaint as asserted against them. *Id.* at *12-14. The Court also found insufficient the pleadings to establish that the affiliated corporate defendants exercised functional control over the plaintiffs. *Id.* For instance, the *Lopez* plaintiffs did not allege that any of the corporate defendants supervised or controlled their work schedules, or facts indicating functional control under the Second Circuit's six-part *Zheng* test described above.

Similarly, in *Santana v. Fishlegs, LLC*, the plaintiffs asserted claims for unpaid wages and overtime against seven corporate restaurant defendants, five of which never employed them. No. 13 Civ 01628 (LGS), 2013 U.S. Dist. LEXIS 159530 (S.D.N.Y. Nov. 7, 2013). Nonetheless, the plaintiffs alleged the seven corporate defendants were a single integrated enterprise with shared ownership, operations, marketing, recruiting, employment methods and human resources personnel. *Id.* at *12. Despite these allegations, the Court dismissed the five corporate defendants that never employed the plaintiffs, finding the single integrated enterprise doctrine inapplicable based on insufficient pleadings. *Id.*

Plaintiffs both allege they exclusively work and/or worked at R.J. 49 Rest., LLC. Compl. ¶¶ 13-14. With respect to the Corporate Defendants (and the other corporate defendants named by Plaintiffs in their Complaint), however, Plaintiffs' allegations, in their entirety, are the same cosmetic and conclusory allegations deemed insufficient in *Lopez* and *Santana*, as follows:

- "At all relevant times, Toasties, was, and continues to be, single and joint employer and has had a high degree of interrelated and unified operation, and share common management, centralized control of labor relations, common ownership, common control, common website, common business purposes and interrelated business goals." Compl. ¶ 30;
- "Upon information and belief, each of the Owner/Operator Defendants possessed operational control over the Defendant Company, possessed an ownership interest in the Defendant Company, and controlled significant functions of the Defendant Company." Compl. ¶ 37;
- "Upon information and belief, Defendants are associated and joint employers, act in the interest of each other with respect to employees, pay employees by the same method, and share control over the employees." Compl. ¶ 38;
- "Upon information and belief, each Defendant possessed substantial control over Plaintiffs' (and other similarly situated employees) working conditions, and over the policies and practices with respect to the employment and compensation of Plaintiffs, and all similarly situated individuals referred to herein." Compl. ¶ 39;

- "At all relevant times, Defendants were Plaintiffs' employers within the meaning of the FLSA and NYLL. Defendants had the power to hire and fire Plaintiffs, controlled the terms and conditions of their employment, and determined the rate and method of any compensation in exchange for their services." Compl. ¶ 42;
- "Defendants jointly employed Plaintiffs, and all similarly situated individuals, and were their employers within the meaning of 29 U.S.C. 201 et seq. and the NYLL." Compl. ¶ 40;
- "In the alternative, the Defendants constituted a single employer of Plaintiffs and all similarly situated individuals." Compl. ¶ 41.

Here, as in *Lopez* and *Santana*, although Plaintiffs allege that all of the named Defendants – including the Corporate Defendants – are joint employers, they fail to plead, as they must under the FLSA, sufficient particularized facts which show a relationship of control between the Corporate Defendants and themselves. The "fundamental" question is whether *each* defendant had the ability to control Plaintiffs' employment. *See Lopez*, 2012 U.S. Dist. LEXIS 173290, at *11 ("[A]llegations of common ownership and common purpose, without more, do not answer the fundamental question of whether each corporate entity controlled Plaintiffs as employees."); *Sampson*, 2012 U.S. Dist. LEXIS 103052, at *12 (dismissing FLSA claims against those defendants which plaintiffs failed to allege "had any direct role in hiring or firing the plaintiffs . . . supervised or controlled their work schedules . . . [or] had any direct role in controlling the plaintiffs' conditions of employment or determining their rate and method of payment"); *Diaz*, 2010 U.S. Dist. LEXIS 107722, at *10 (dismissing FLSA claims against defendants because "[t]he complaint contains no facts that indicate that [the defendant] had any direct role in managing the plaintiffs, hiring or firing the plaintiffs, determining their working hours, or maintaining employment records" to demonstrate that defendants were plaintiffs' employer); *cf. Lans v. Kiska Constr. Corp.*, No. 96 Civ. 4114 (KMW)(AJP), 1997 U.S. Dist. LEXIS 21271, at *16 (S.D.N.Y. Apr. 18, 1997) (dismissing entity as plaintiff's "employer" where plaintiff failed to assert any "*facts* supporting the employment relationship" and merely set forth "in conclusory terms that the [defendant] is her 'employer'").

Plaintiffs do not set forth a *single* factual allegation which even suggests that the Corporate Defendants exercised control over the terms and conditions of Plaintiffs' employment. *See, e.g.*, *Cannon*, 2007 U.S. Dist. LEXIS 91139, at *12 (dismissing FLSA claims and holding that "beyond reciting the elements of a joint employer arrangement, plaintiffs have not shown that [the alleged employer] did, in fact, play a role in supervising plaintiffs' work"). Plaintiffs do not claim with particularity that any defendant other than Employer and Robert Kim hired or fired them, supervised and controlled their work schedules, determined their rate and method of payment, or maintained their employment records. Rather, Plaintiffs make boilerplate conclusory allegations that regurgitate the legal standard under the law, and they make most of these allegations ***upon information and belief***. *See e.g.* Compl. ¶ 37 ("Upon information and belief, each of the Owner/Operator Defendants possessed operational control over the Defendant Company, possessed an ownership interest in the Defendant Company, and controlled significant functions of the Defendant Company.").

The instant allegations are thus distinguishable from this Court's decision in *Juarez v. 449 Rest., Inc.*, 29 F. Supp. 3d 363, 367-368 (S.D.N.Y. 2014), where plaintiff's "cosmetic" allegations of integrated or joint operations (such as those outlined above) were simply backdrop for his core allegation: that he himself performed work at the three Moonstruck Diner locations in question, a bona fide factual allegation tending to show centralized labor policy. There are no such allegations here, nor could there be. Plaintiffs plainly admit that they were hired, and in the case of Plaintiff Apolinar, fired by Robert Kim and have worked exclusively for Employer. *See* Compl. ¶¶ 54, 103-104, 106. Likewise, they do not assert a single factual allegation suggesting that they have any knowledge whatsoever regarding the employment practices and/or policies employed by the Corporate Defendants. That Employer markets with other related entities on the Internet is of no moment. This scenario bears greater similarity to *Ouedraogo v. A-1 Int'l Courier Serv., Inc.*, 12-cv-5651-AJN (S.D.N.Y.), where this Court determined that conditional certification of the collective action in that case was necessarily limited to "Plaintiff's own declaration regarding his experience at the Long Island City facility" and other evidence relating to that facility. *Ouedraogo* DKT 105 at 2.

Plaintiffs also have failed to plead, as they must under the FLSA, sufficient, particularized facts which show any functional relationship between the Corporate Defendants and themselves. *See Lopez*, 2012 U.S. Dist. LEXIS 173290, at *12 (complaint allegations alleging defendants shared a common bookkeeper, accountant, and general manager, absent more, was insufficient to state a cause of action under the FLSA against other entities that did not employ Plaintiffs); *Santana*, 2013 U.S. Dist. LEXIS 159530, at *23 (complaint allegations alleging corporate defendants shared ownership, operating, marketing, recruiting, employment methods and human resources, without more, was insufficient to state a cause of action under the FLSA against other entities that did not employ Plaintiffs). Plaintiffs' conclusory allegations relating to purported common ownership and control are inadequate to survive dismissal at the pleading stage.

Put simply, the Amended Complaint lacks the necessary factual allegations that plausibly link the Corporate Defendants to Plaintiffs. Instead, Plaintiffs offer boilerplate allegations under the FLSA and NYLL directed to "Defendants" generally which lack specifics to any particular corporate defendant other than Employer. *See generally* Compl. ¶¶ 8-9, 68-128.

Accordingly, the Corporate Defendants – separate entities for which Plaintiffs never worked – should be dismissed.

B. Plaintiffs' Complaint Fails to Allege Facts Sufficient to State a Claim That Susan Kim Was Their Employer or Joint Employer

(i) Employer Standard for Individuals under the FLSA

The analysis of whether individuals constitute employers within the meaning of the FLSA also hinges on the economic reality rather than technical concepts. *Irizarry v. Catsimatidis*, 722 F.3d 99, 104 (2d Cir. 2013) (internal citation omitted); *see also Herman*, 172 F.3d at 139. Courts applying the economic realities test have found that, "[g]enerally, corporate officers and owners held to be employers under the FLSA have had some direct contact with the plaintiff employee, such as *personally* supervising the employee's work, determining the employee's day-to-day work schedule or tasks, signing the employee's paycheck or directly hiring the employee." *Tracy v. NVR, Inc.*, 04 CV 6541L, 2009 U.S. Dist. LEXIS 90778, at *15 (W.D.N.Y. Sept. 30, 2009)(emphasis added), *aff'd in relevant part at* 667 F. Supp. 2d 244 (W.D.N.Y. 2009).

In *Pazos v. Le Bernardin Inc.*, 11 cv 8360 (RJS), (S.D.N.Y. Apr. 27, 2012), Judge Sullivan dismissed claims under the FLSA against two individually-named restaurant owners after concluding the plaintiffs failed to sufficiently allege facts to satisfy the economic realities test. In granting the defendants' motion to dismiss, the Court ruled that, other than a conclusory reference to the individual defendants' "power to hire and fire" employees, there were "really no facts . . . indicat[ing] the degree or the amount of interaction or control that the individual defendants have over [the] individual plaintiffs."[8]

[8] A copy of Judge Sullivan's April 27, 2012 Order, as well as the pertinent portions of the underlying transcript from the oral argument during which the defendants' motion was granted, is attached to the Greenberg Decl. as Ex. B. *See* Transcript at 8-9.

Similarly, in *Lian Lin*, Judge Castel found allegations similar to those asserted in the Amended Complaint inadequate to nudge a complaint past a motion to dismiss. *Lin*, 2009 U.S. Dist. LEXIS 29779, at *7-8. Employees of Comprehensive Health Management, Inc. ("CMHI") sued CMHI as well as various individual employees of CHMI, all as "employers" pursuant to the FLSA. *Id.* at *2. The Court noted the complaint did not sufficiently allege the degree of control by each individual defendant over the "plaintiffs' hours, wages, or other terms and conditions of employment" to characterize them as "employers" pursuant to the FLSA. *Id.* at *7.

Judge Seybert reached the same conclusion in *Wolman*, where the Court applied the economic realities test to an individually-named defendant and concluded that the plaintiffs failed to assert that he "exercised sufficient control over [them] to be considered their employer." *Wolman*, 853 F. Supp. 2d at 299. In its assessment, the Court focused on the following complaint allegations regarding the individually-named defendant:

> (1) he is the President, CEO, and Director of CHS….; (2) his responsibilities include "actively managing [CHS]…," "mak[ing] decisions regarding benefits for the staff…," and "mak[ing] decisions that concern defendants' operations and significant functions, including functions related to employment, human resources, training and payroll…;" and (3) he was "involved in creating and/or implementing of the [sic] illegal policies complained of in this case…."

Id. Although the *Wolman* Court noted that the complaint asserted that the individually-named defendant had "at least some control over the [p]laintiffs' 'method of payment' because he was involved in creating and implementing [a pay] policy," the Court nevertheless ruled that "the 'economic reality,' considering the totality of the circumstances, [was] that [the individually-named defendant] did not 'possess[] the power to control the workers in question.'" *Id.* In dismissing the plaintiffs' claims against the individually-named defendant, the Court ruled that the plaintiffs' complaint was devoid of any facts that *he* ever had contact with the lead plaintiffs or "operational control" over the employing entity. *Id.*; *see also Ashby v. Nat'l Freight, Inc.*, Case No. 8:07-cv-898-T-30MSS, 2007 U.S. Dist. LEXIS 80437, at *3 (M.D. Fla. Oct. 30, 2007) (dismissing FLSA claim against individual defendant because plaintiff "ha[d] not alleged what level of operational control or authority, if any, [the individual defendant] had over [p]laintiff's compensation, schedule, or workload").

(ii) Plaintiffs Do Not Allege Facts That Satisfy the Employer Standard as to the Individual Defendant

As with the Corporate Defendants, Plaintiffs fail to plead sufficient, particularized facts which might support a claim that the Individual Defendant was their employer or joint employer. The only allegations against the Individual Defendant state, without any factual support whatsoever, that:

- "Upon information and belief, each of the Owner/Operator Defendants possessed operational control over the Defendant Company, possessed an ownership interest in the Defendant Company, and controlled significant functions of the Defendant Company." Compl. ¶ 37;
- "SUSAN KIM, known as 'Boss' Mother' to Plaintiffs, is in charge of all areas of the Toasties deli enterprise, including the hiring and termination of workers, determining the rates of pay, work schedule (including work hours and work days), type of work assigned, designated work load and employment policy at R.J. 49 REST., LLC d/b/a Toasties; ARK 48TH CORP d/b/a Toasties; R J 51, INC. d/b/a Toasties; N.J. 52 INC. d/b/a Toasties; 924 THIRD AVE. DELI, INC. d/b/a Toasties; JOHN DOE CORPORATION d/b/a Toasties; TOASTIES ONE CORP d/b/a Toasties; TOASTIES DELI CORP d/b/a Toasties; CCKO, INC. d/b/a Toasties." Compl. ¶ 48;
- "Upon information and belief, SUSAN KIM acted intentionally and maliciously and is an employer pursuant to FLSA, 29 U.S.C. §203d, and regulations promulgated thereunder, 29 C.F.R. §791.2, NYLL §2 and the regulations thereunder, and is jointly and severally liable with TOASTIES." Compl. ¶ 49.

Notably, Plaintiffs do *not* allege that the Individual Defendant *actually* played any role whatsoever in setting *their* terms and conditions of employment. If the Individual Defendant hired or fired Plaintiffs, supervised or scheduled Plaintiffs, determined Plaintiffs' rate of pay, or maintained the employment records for Plaintiffs, Plaintiffs should so claim in the Complaint.

Instead, Plaintiffs' particularized factual allegations relate ***exclusively*** to Defendant Robert Kim. They claim that Defendant Robert Kim was their "boss," (Compl. ¶ 46), assigned their work (Compl. ¶¶ 59, 111), set compensation policies (Compl. ¶¶ 60, 96, 112, 132) and, in the case of Plaintiff Apolinar, fired him (Compl. ¶¶ 62, 103-104). With respect to the Individual Defendant, Plaintiffs gloss over the need to assert specific factual allegations by merely regurgitating the applicable legal test and lumping together the Individual Defendant and the Corporate Defendants. *See, e.g.*, *Lian Lin*, 2009 U.S. Dist. LEXIS 29779, at *7 (dismissing complaint that "does not allege any facts regarding the positions held by the Individual Defendants or their power to control plaintiffs' hours, wages, or other terms and conditions of employment"); *Bravo v. Eastpoint Int'l, Inc.*, No. 99 CV 9474 (WK), 2001 U.S. Dist. LEXIS 3647, at *4-5 (S.D.N.Y. Mar. 30, 2001) (dismissing FLSA claim against fashion designer Donna Karan as employer because plaintiffs only alleged her status as the owner and chairperson of employer company and failed to allege any facts establishing her "power to control the plaintiff workers"). This inadequate pleading is a poor substitute for properly pled allegations that the Individual Defendant is an "employer" within the meaning of the FLSA – a prerequisite for proceeding against the Individual Defendant. *See Lian Lin*, 2009 U.S. Dist. LEXIS 29779, at *5.

Accordingly, all claims against the Individual Defendant should be dismissed.

II. PLAINTIFFS' BREACH OF IMPLIED CONTRACT CLAIM MUST ALSO BE DISMISSED BECAUSE PLAINTIFFS DO NOT ALLEGE ANY CONDUCT BY THE MOVING DEFENDANTS

Plaintiffs' breach of implied contract claim similarly must be dismissed because they fail to allege any facts whatsoever that the Moving Defendants contracted with Plaintiffs. Under New York law, just as with breach of an express contract, there must be "a meeting of the minds as to the material terms of an implied contract." *Venezia v. Luxottica Retail N. Am. Inc.*, 2015 U.S. Dist. LEXIS 130926, *45 (S.D.N.Y Sept. 28, 2015) (internal quotation and citations omitted). Here, Plaintiffs do not make a single specific factual allegation regarding a meeting of the minds with the Moving Defendants. Rather, the particularized factual allegations refer solely to alleged costs incurred by Plaintiffs in connection with the purchase and repair of their bicycles, which they used throughout their employment with the Employer. Because Plaintiffs fail to allege facts sufficient to establish that the Moving Defendants were their employer, their breach of implied contract claim likewise must be dismissed as against the Moving Defendants.

III. PLAINTIFFS' CLAIMS FOR FRAUDULENT FILINGS MUST BE DISMISSED FOR FAILURE TO COMPLY WITH THE *IQBAL/TWOMBLY* PLEADING STANDARD

Plaintiffs seek damages under 26 U.S.C. §7434 and New York General Business Law § 349 against all Defendants, including the Moving Defendants, in connection with alleged "fraudulent filings" made by Defendants. Conspicuously, however, Plaintiffs fail to plead with any specificity the nature of the purported fraudulent filings. Moreover, Plaintiffs do not allege whether such filings were made on behalf of all Defendants, solely the Corporate Defendants, or on behalf of only some Defendants. As such, Plaintiffs have unequivocally failed to set forth sufficient factual matter to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). Accordingly, these claims do not meet the pleading standard set forth by the Supreme Court and must be dismissed as a matter of law.

CONCLUSION

For the foregoing reasons, the Moving Defendants respectfully request that Plaintiffs' Complaint be dismissed against them in its entirety for failure to state a claim.

Dated: New York, New York
April 11, 2016

Respectfully submitted,

JACKSON LEWIS P.C.
ATTORNEYS FOR DEFENDANTS R.J. 49 Rest., LLC, R.J. 51 Inc., N.J. 52 Inc., Susan Kim and Robert Kim
666 Third Avenue, 29th Floor
New York, New York 10017
(212) 545-4000

By: */s Richard I. Greenberg*
Richard I. Greenberg, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2016, the enclosed **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' R.J. 51 INC.'S, N.J. 52 INC.'S AND SUSAN KIM'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT PURSUANT TO RULE 12(B)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE** was electronically filed with the Clerk of the Court and served in accordance with the Federal Rules of Civil Procedure, the Southern District's Local Rules, and the Southern District's Rules on Electronic Service, upon the following parties and participants:

JOHN TROY, ESQ.
TROY LAW, PLLC
ATTORNEYS FOR PLAINTIFFS
41-25 Kissena Boulevard, Suite 119
Flushing, New York 11355

/s *Richard I. Greenberg*
Richard I. Greenberg

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